

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)

Definition of Markets for Purposes of the)
Cable Television Mandatory Television)
Broadcast Signal Carriage Rules)

CS Docket No. 95-178

Implementation of Section 301(d) of the)
Telecommunications Act of 1996)

Market Determinations)

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REPLY COMMENTS
OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

The National Cable Television Association, Inc. ("NCTA"), by its attorneys, hereby submits its Reply Comments in the above-captioned proceeding.

INTRODUCTION

The Commission's Further Notice seeks comments on ways to facilitate a more orderly transition from use of ADIs to DMAs for purposes of defining a television station's must carry market. The change in markets should not be used as a pretext for increasing must carry burdens on the cable industry. Unfortunately, several of the proposals from individual broadcasters in this proceeding would have this effect.¹

For example, some stations propose rules that would subject operators to must carry obligations not only from broadcasters within whose DMA market they would be located, but would grandfather carriage of broadcasters from other markets too. The Commission should

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¹ NCTA believes that must carry rules are a burden on operators, programmers, and their customers, even in the absence of these market changes, and that the rules are unconstitutional.

avoid imposing these ever-increasing must carry burdens on operators, programmers, and their customers.

Other broadcasters seek to use this proceeding as a means of forcing carriage on systems far beyond their area of license. In so doing, they seek to erect additional barriers to cable operators' ability to file market modifications to exclude stations from carriage in a particular community. As explained below, the Commission should not adopt this unfounded proposal.

DISCUSSION

I. THE COMMISSION SHOULD NOT GRANDFATHER CARRIAGE OF STATIONS THAT ARE NO LONGER IN A SYSTEM'S MARKET

In the initial stage of this proceeding, NCTA advocated that the Commission, in order to maintain stability, should continue to use ADIs for must carry market definition purposes. The Commission, however, decided to switch to use of DMAs beginning in the 1999 must carry election period. Having made that choice, certain broadcasters urge in this Further Notice that use of DMAs would disadvantage them because they would no longer qualify for mandatory carriage on a cable system. The comments of The Post Company note that smaller stations will find this particularly problematic as they may have invested in equipment to ensure delivery of a good quality signal to a cable system currently in its market, but not within its DMA.

An unfortunate consequence of the switch to DMAs is the disruption to both systems and stations. But The Post Company proposes a one-sided solution to the problem by urging that the Commission grandfather stations on those systems for which the station previously was required to install equipment to ensure reception at the headend.² While this solution protects broadcast stations, it is particularly unfair to cable operators and programmers. This proposal will increase

² Comments of The Post Company at 3-4.

must carry burdens significantly by requiring carriage of stations from two markets, shutting out even more satellite program networks from their only avenue into cable homes.

If a station serves the cable community, the statute already provides a remedy short of this blanket grandfathering approach. A station can seek to have its market modified under Section 614(h). In this manner, stations that are truly local can make their case as to why that remains true. And operators can demonstrate whether other factors warrant a different conclusion.

Another approach suggested by the Small Cable Business Association ("SCBA") more properly balances the interests of broadcasters and operators. SCBA identifies the numerous costs imposed on cable operators and their customers caused by switching to a DMA standard. SCBA proposes that small operators should be permitted to opt out of a switch to the DMA in the 1999 election period. Small systems also should be able to protect existing program line-ups and require broadcasters to reimburse small operators for certain costs of new signal carriage requirements. The Commission, should it determine that protection for small companies is warranted, should also protect small cable operators against the increased burdens resulting from the change to DMAs.

II. THE COMMISSION SHOULD MAINTAIN ITS POLICY REGARDING DELETION OF MARKETS

In adopting the must carry provisions, Congress recognized that no matter what market measurement is used, it could result in anomalous results that did not reflect actual service to a particular community. For this reason, Congress provided that cable operators could petition to modify a market to exclude certain stations from carriage in their community.³ The market modification provisions "reflect a recognition that ... a community within a station's ADI may be

³ 47 U.S.C. Section 534 (h).

so far removed from that station that it cannot be deemed part of the station's market."⁴ This concern still remains now that broadcasters will rely on DMAs for determining their market.

The Comments of Paxson Communications Corporation, however, would have the Commission write this provision out of the Act. The Commission should not adopt this effort to expand must carry rights for television stations far beyond the communities they serve.

First, Paxson urges that the Commission should erect a threshold barrier to considering cable operator petitions for market modification based on whether one-third of that system's capacity is devoted to carriage of local stations.⁵ According to Paxson, "if the cable operator has not devoted one-third of its channels to local stations, the Commission should presumptively deny the operator's request, as it could not further the 'value of localism' as mandated by the statute nor could it further the mission of the FCC to foster the fullest use of the television spectrum."⁶

This "one-third" presumption has no basis in the Act. Whether an operator has filled up one-third of its capacity with must carry stations depends on a number of external factors -- such as its channel capacity and the number of signals licensed by the FCC in the area. Merely because an operator has not reached the theoretical limit of its channel carriage obligation says nothing about whether it is complying with the Act's must carry mandate. More important, an operator's failure to reach the one-third cap has no relationship to whether a signal in fact is local to that cable community.

⁴ H.R. Rep. No. 628, 102d Cong., 2d Sess. 97 (1992).

⁵ Comments of the Paxson Communications Corporation at 11 (hereinafter "Paxson Comments").

⁶ Id.

Paxson's real complaint, apparently, is that in some cases the FCC has decided that it cannot force cable operators, that have systems miles beyond the community Paxson's station is licensed to serve, to carry its signal. But as even NAB's Comments admits, "some must carry zones established by ADIs or DMAs are admittedly imperfect because ADIs and DMAs were not designed expressly for the purposes Congress intended for must carry."⁷

Second, Paxson and WRNN propose that the Commission change the criteria used in determining whether a market should be modified. Specifically, Paxson complains that the FCC relies on Grade B coverage and distance from the cable community in reviewing these requests.⁸ And Paxson and WRNN urge that the statutory factors regarding historical carriage, coverage, other stations carried, and evidence of viewing patterns be given little, if any, weight.⁹ Instead, they argue that the Commission should give more weight to whether a station plans in the future to provide local programming to the cable community.¹⁰ Indeed, WRNN's comments claim that "in an era when technology such as fiber optics, microwave relays, and translators renders the relevance of over-the-air signal coverage ancillary at best, programming must come to the fore in a market modification analysis."¹¹

But this new-found justification for must carry has no basis in the statute. As the Cable Services Bureau previously has found, "[t]he broadcast signal carriage rules were not intended to

⁷ Comments of the National Association of Broadcasters at 3 (hereinafter "NAB Comments").

⁸ Paxson Comments at 20.

⁹ Id.

¹⁰ Id. at 30; Comments of WRNN-TV Associated Limited Partnership at 6 (hereinafter "WRNN Comments").

¹¹ WRNN at 9.

transform an otherwise local station into a regional 'superstation' that must automatically be carried in every single community in an ADI... If this were the case, then Congress would not have included a deletion mechanism as it had in Section 614(h) of the 1992 Cable Act."¹² The Bureau properly has decided that these empire-building promises, which have no relation to serving local markets, should not be given decisive weight in defending against a market modification petition.¹³

III. THE COMMISSION SHOULD NOT REOPEN DECISIONS TO MODIFY A MARKET TO EXCLUDE STATIONS FROM CARRIAGE

In our initial comments, NCTA proposed that the Commission not reopen decisions made to exclude television stations from a market. NCTA urged that the Commission had already undertaken a particularized examination of the television station's coverage in those cases, and it would waste resources to no avail to reevaluate these determinations.

Paxson, however, argues that "past decisions predicated on an ADI standard should be subject to de novo reconsideration under the special relief process established by Section 614(h)(1)(C)."¹⁴ But Paxson presents no evidence why these decisions lose their validity once DMAs are in use. After all, the criteria established in Section 614(h)(1)(C) in determining whether a station should be deleted from a market do not hinge on whether the ADI or DMA standard is used. For example, the station's coverage area or local programming, historical carriage, and viewing patterns in cable and non-cable homes are unaffected by this change in market definition. In the absence of any evidence of a change in these or other statutory factors

¹² Time Warner Entertainment-Advance/Newhouse Partnership, 11 FCC Rcd. 6541, 6554 (1996).

¹³ See e.g., Petition of Comcast Cablevision of Monmouth County, 11 FCC Rcd. 6440, 6449 (1996).


¹⁴ Paxson Comments at 33-34.

in a particular situation, there is nothing that a de novo review of factual findings would produce. The Commission should not give Paxson yet another bite at the apple to attempt to prove that it is serving communities many miles away.¹⁵

CONCLUSION

For the foregoing reasons, and for the reasons stated in our initial comments herein, the Commission should adopt rules consistent with these comments and reply comments.

Respectfully submitted,


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¹⁵ See, e.g., Time Warner New York City Cable Group, CSR-4794-1, DA 96-1545 (Paxson station, WHAI, licensed to Bridgeport, Connecticut, excluded from New York City system located 65 miles away).